APPENDIX

IN THE
SUPREME COURT OF THE STATE OF KANSAS

No. 82-54608-S

Phillips Petroleum Company, Appellee,

v.

Honorable Keaton Duckworth, District Judge,
26th Judicial District, et al., Appellants.

You are hereby notified of the following action taken in the above entitled case:

PETITION FOR ORDER OF MANDAMUS.

DENIED.

Yours very truly,

Lewis C. Carter
Clerk, Supreme Court

Date June 28, 1982

A2

(Filed June 3, 1982)

IN THE
DISTRICT COURT OF SEWARD COUNTY, KANSAS
CASE NO. 79-C-113

IRL SHUTTS and ROBERT ANDERSON and
BETTY ANDERSON, Individually and as
representatives of certain others,
Plaintiffs,

vs.

PHILLIPS PETROLEUM COMPANY,
Defendant.

JOURNAL ENTRY ON CLASS CERTIFICATION AND NOTICE

NOW, on this 21st day of May, 1982, this matter comes on for hearing on plaintiffs' motion to certify as a class action and determine notice, and defendant's motion to dismiss as to all members of the class not residents of Kansas. The following appearances are made:

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Thereupon, the motions are presented and argued to the Court after the matters had been briefed by counsel. The Court, having read the briefs and heard argument of counsel, and based upon the files and records in this matter and the evidence presented, finds, AND IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. The proposed class of parties plaintiff is extremely numerous and exceeds some 33,000 members and an actual joinder of all members is totally impracticable.

2. The claims of plaintiffs are typical of the claims of all the members of the class except that each owner may be entitled to a different amount of interest and the interest to each owner, if allowed, would be too small to enable each to file a separate action.

3. The only questions of law and fact in this case are common to the entire proposed class, in that the sole issue appears to be whether defendant is liable for interest on the money received by it from purchasers of gas pursuant to opinions No. 699, 749 and 770 of the Federal Power Commission and withheld by defendant for a period from December 30, 1975, to July 1, 1980.

4. This action should be certified as a class action and the plaintiff class is defined as follows:

> "All royalty owners and overriding royalty owners to whom Phillips Petroleum Company made suspense royalty payments between December 30, 1975, and

July 1, 1980, relating to Federal Powers Commission Opinions 699, 749 and 770 (which includes 699H, 749C and 770A)."

5. Notice of the pendency of this action, its nature and effects of any judgment shall be given to all members of the class. The form of such notice, which is approved by the Court, is attached hereto and made a part hereof. The defendant shall provide to the plaintiffs a list of all members of the class and their mailing addresses as shown by defendant's records. The defendant shall provide to plaintiffs pressure sensitive mailing labels for each member of the class which shall contain thereon their individual name and address. The plaintiffs shall cause the notice to be mailed to all members of the class by first class mail and the plaintiffs shall bear all expense thereof. The envelopes shall contain the following return information:

RETURN TO:

SMITH, GREENLEAF & BROOKS
Box 1039
Liberal Kansas 67901.

The notice is to be dated June 15, 1982, and request for exclusion must be filed by August 1, 1982.

6. If any of the notices sent to class members are returned by the postal service as non-deliverable, the plaintiffs will notify defendant of the names; and defendant is to further check its records and provide plaintiffs with all information it has pertaining to such class member, so that notice may be provided to such person and/or such persons, heirs, devisees or assigns.

7. The plaintiffs' request to certify as a class other than the class set out herein is overruled.

8. The defendant's motion to dismiss as to non-resident class members is overruled.

/s/ Keaton G. Duckworth
Judge

APPROVED AS TO FORM:

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IN THE
DISTRICT COURT OF SEWARD COUNTY, KANSAS

CASE NO. 79-C-113

IRL SHUTTS and ROBERT ANDERSON and
BETTY ANDERSON, Individually and as
representatives of certain others,
Plaintiffs,

vs.

PHILLIPS PETROLEUM COMPANY,
Defendant.

NOTICE OF CLASS ACTION SUIT

TO: Royalty owners and overriding royalty owners to whom Phillips Petroleum Company made suspense royalty payments between December 30, 1975, and July 1, 1980, relating to Federal Power Commission Opinions No. 699, 749, and 770.

This notice is to inform you that you, as royalty owner or overriding royalty owner under an oil and gas lease in which Phillips Petroleum Company is an interest owner, are a member of the plaintiff class, in a court action against Phillips Petroleum Company.

The purpose of this Notice is to advise you of your rights and obligations in relation to this lawsuit.

This suit was filed in July, 1979, by the above named plaintiffs, individually and on behalf of all other royalty owners and overriding royalty owners to whom this notice is directed. Plaintiffs seek judgment against Defendant for the payment of interest on suspended royalty paid by Defendant between December 30, 1975, and July 1, 1980, attributable to increased gas sales prices approved

by the Federal Power Commission in Opinions Nos. 699, 749, and 770. There are in excess of 30,000 gas royalty owners and overriding royalty owners who are members of the class.

Defendant Phillips had denied any liability to plaintiffs or members of the class described above.

The Court has made no rulings as to the merits of these claims or defenses, yet has held that this action is to be maintained as a class action. Accordingly:

1. By order of this court dated May 21, 1982, you have been found to be a member of the plaintiff class in this lawsuit.

2. As a class member, your interests are currently being represented by the three named plaintiffs and their attorneys of record listed below. Any class member, if he or she so desires, may appear in the case in person or through his or her own counsel.

3. You may elect to be excluded from the class, by sending the request for exclusion form which appears at the end of this notice to the Clerk of the Court addressed as follows:

Clerk of the Court
Seward County, Kansas
415 N. Washington
Liberal, Kansas 67901

This request must be mailed so as to be received on or before August 1, 1982. The Court has determined that all requests for exclusion received on or before that date will be granted without further hearing.

4. Judgment in this action, whether for the plaintiff class or the defendant, will be binding upon all class mem-

bers except those who may be excluded as above stated. Class members excluded will not be entitled to share in the benefit of any judgment or settlement entered or concluded favorable to the plaintiff class, nor will excluded class members be held bound in this action if judgment is rendered for Phillips.

5. Plaintiffs' attorneys fees are contingent on recovery. If the plaintiffs are successful, the court will allow a reasonable attorneys' fee for plaintiffs' attorneys, not exceeding one-third of the interest fund created. This means that if a judgment in your favor is entered, the court may award up to one-third of it to be paid to the plaintiffs' attorneys to compensate them for representing your interests. If you elect to intervene with your own attorneys, your share of the favorable judgment will not be reduced. If you request exclusion from the class, you will not be assessed any attorneys' fees. If plaintiffs are unsuccessful, there will be no allowance of attorneys' fees.

If you want further information, please do not call or write the Judge or the Clerk of the Court, but call or write one of the attorneys listed below.

DATED: June 15, 1982.

Keaton G. Duckworth, District Judge

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(Filed June 15, 1982)

IN THE
SUPREME COURT OF THE STATE OF KANSAS

No. 82-54608-S

PHILLIPS PETROLEUM COMPANY,
Plaintiff,

vs.

KEATON G. DUCKWORTH, District Judge, 26th Judicial District, IRL SHUTTS, and ROBERT ANDERSON and BETTY ANDERSON, individually and as representatives of all producers and royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds or royalties pursuant to Federal Power Commission Opinion Nos. 699, 699H, 749, 749C, 770, and 770A,
Respondents.

PETITION FOR ORDER OF MANDAMUS

COMES NOW Phillips Petroleum Company (Phillips) and for its claim for relief alleges:

1. Phillips is a corporation organized and existing under and by virtue of the laws of the State of Delaware, having as its principal place of business Bartlesville, Oklahoma.

2. The Honorable Keaton G. Duckworth is the duly elected, qualified and acting District Judge of the Twenty-sixth Judicial District of the State of Kansas. Irl Shutts, Robert Anderson and Betty Anderson in their individual and representative capacities are plaintiffs in a pending lawsuit as hereinafter described.

3. This Court has jurisdiction to hear original actions in mandamus by virtue of Article III, Section 3, of the

Constitution of the State of Kansas, K.S.A. 20-101, and Supreme Court Rule 9.01. Mandamus is an appropriate method by which to test the jurisdiction of an inferior court. This Court should hear this action rather than the District Court, since mandamus is an appropriate vehicle to control the activities of a District Court when it exceeds its lawful jurisdiction.

4. On July 3, 1979, Irl Shutts, Robert Anderson and Betty Anderson filed an action against Phillips Petroleum Company in the District Court of Seward County, Kansas, Case No. 79-C-113. A certified copy of the Petition is attached hereto, marked Exhibit "A", and incorporated herein. The plaintiffs purported to bring that action on behalf of themselves and various nation-wide classes of royalty owners and producers under oil and gas leases for payment of interest on additional FPC royalties which Phillips had paid pursuant to FPC Opinions Nos. 699, 699H, 749, 749C, 770, and 770A.

5. On August 7, 1979, Phillips filed its Answer, Pretrial Motion and Counterclaim generally denying the allegations of the petition, asserting that the District Court was without jurisdiction of the alleged nation-wide class and Phillips moved to dismiss the action as to the unnamed non-resident class members. A certified copy of said Answer, Pretrial Motion and Counterclaim is attached hereto, marked Exhibit "B," and incorporated herein.

6. On August 15, 1980, the plaintiffs filed a Motion To Certify as a Class Action. A certified copy of said Motion is attached hereto, marked Exhibit "C," and incorporated herein. By such motion plaintiffs sought to certify a nation-wide class of plaintiffs consisting of three nation-wide subclasses of royalty owners and producers as follows:

a. A subclass consisting of producers and royalty owners who received payment from Phillips of sus-

pended monies pursuant to FPC Opinions 699 and 699H, 23,858 checks having gone out to them.

b. A subclass consisting of producers and royalty owners who received payments from Phillips pursuant to Opinions Nos. 749 and 749C theretofore suspended by Phillips, total number of checks going out to producers and royalty owners being approximately 23,500 checks.

c. A subclass consisting of producers and royalty owners who received payment from Phillips pursuant to FPC Opinions Nos. 770 and 770A theretofore suspended by Phillips, there having been more than 16,157 checks gone out to such producers and royalty owners.

7. On May 21, 1982, an Order was entered purporting to establish a nation-wide class of plaintiff royalty owners and overruling Phillips' motion to dismiss the claims of the non-resident putative class members. A certified copy of said Order is attached hereto, marked Exhibit "D," and incorporated herein. At the same time, Judge Duckworth set this matter for trial on September 9, 1982, in Liberal, Kansas.

8. Phillips alleges that Judge Duckworth was without authority to enter the Order, Exhibit "D," because the court lacked jurisdiction over the claims of unnamed non-resident putative class members. A memorandum of authorities on this point is being filed concurrently herewith.

9. Phillips alleges further that the defendant failed to follow this Court's implicit holding in *Shutts v. Phillips Petroleum Company*, 222 Kan. 527, 567 P.2d 1291 (1977) *cert. denied*, 434 U.S. 1068 (1978). In that case this Court approved the rule of *Feldman v. Bates Mfg. Co.*, 143 N.J. Super. 84, 362 A.2d 1177 (1976), and cited that case as an

"excellent example of a factual situation" in which state court jurisdiction over a nation-wide class should be denied. Phillips alleges that the present action pending before the Honorable Keaton G. Duckworth is in all respects the same as *Feldman v. Bates* approved by this Court as is further demonstrated by the memorandum of authorities filed herewith.

10. Phillips is entitled to an order of mandamus from this Court directing the Respondent, the Honorable Keaton G. Duckworth, to modify the Class Order of May 21, 1982, by decertifying the class as to all unnamed non-residents of the State of Kansas and by dismissing all claims of such unnamed non-resident putative class members. In the meantime, and pending a hearing on this Petition, Phillips requests an order of this Court staying all further proceedings in Case No. 79-C-113 before the Respondent Keaton G. Duckworth until the jurisdiction of that court to proceed is finally adjudicated. In that regard, Phillips has been advised by counsel for Shutts, et al., that, because of the filing of this Petition, Shutts, et al., do not intend to mail the class notices as provided for in the Class Order of May 21, 1982, until this matter is finally determined. As noted above, this case is presently set for trial on September 9, 1982, as a nation-wide class action. If it is ultimately determined, as Phillips believes that it will be, that the court lacks jurisdiction over the claims of the unnamed non-resident class members, then Phillips will be extremely prejudiced by being put to a trial of this case as a nation-wide class action suit over which the court lacks jurisdiction.

11. This Court should issue the admittedly extraordinary order of mandamus to supervise the lower court and render a final decision on the important jurisdictional question raised by this Petition. No other procedure is available to Phillips to seek redress from what it considers to be an unconstitutional exercise of jurisdiction. There-

fore, Phillips, in order to protect its rights, requests that this Court enter an order of mandamus to the Respondent, the Honorable Keaton G. Duckworth, as hereinbefore described.

WHEREFORE, plaintiff Phillips Petroleum Company prays that this Court issue an order of mandamus directed to the Honorable Keaton G. Duckworth, District Judge of the 26th Judicial District of the State of Kansas, ordering and directing said Respondent to modify the Order entered on May 21, 1982, by decertifying the class as therein defined as to all unnamed non-resident class members and further modify said order by dismissing the purported claims of all said unnamed non-resident class members against Phillips. Phillips further prays for an order staying all further proceedings in Case No. 79-C-113 before the Respondent Keaton G. Duckworth until this matter has been finally determined, and for such other and further relief as to the Court may seem just and equitable.

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(Filed June 15, 1982)

IN THE
SUPREME COURT OF THE STATE OF KANSAS

No. 82-54608-S

PHILLIPS PETROLEUM COMPANY,
Plaintiff,

vs.

KEATON G. DUCKWORTH, District Judge, 26th Judicial District, IRL SHUTTS, and ROBERT ANDERSON and BETTY ANDERSON, individually and as representatives of all producers and royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds or royalties pursuant to Federal Power Commission Opinion Nos. 699, 699H, 749, 749C, 770, and 770A,
Respondents.

MEMORANDUM IN SUPPORT OF PETITION FOR ORDER OF MANDAMUS

INTRODUCTION

The nature of the dispute underlying *Shutts v. Phillips Petroleum Company*, Case No. 79-C-113 (*Shutts II*), should be familiar to the Court. This action is one brought to obtain interest on additional royalties paid by Phillips Petroleum Company (Phillips) to gas royalty owners following approval of gas rate increases by the Federal Power Commission. In many respects, this action is similar to the prior action of *Shutts v. Phillips Petroleum Company*, 222 Kan. 527, 567 P.2d 1291 (1977) *cert. denied*, 434 U.S. 1068 (1978) (*Shutts I*). In important factual respects, however, this present action differs greatly from the prior action.

On May 21, 1982, the Honorable Keaton G. Duckworth certified a class which included individuals residing throughout the nation and several foreign countries. This action was taken although the uncontroverted record disclosed that only a minute fraction of the unnamed individuals owned interests in Kansas gas properties or were Kansas residents. The remaining individuals—well over 95 percent of the royalty owners involved—have interests which arose outside the state and are totally unconnected with Kansas. As to those claims, Phillips maintains that Kansas lacks the *necessary legitimate interest* required to exercise jurisdiction over these claims. Phillips opposed class certification on this basis and was unsuccessful. Because Phillips believes that the actions of the lower court in certifying a nation-wide class clearly exceed the jurisdictional limits of the lower court and are contrary to both Kansas law and the United States Constitution, Phillips is seeking relief by way of mandamus.

This memorandum is submitted pursuant to Supreme Court Rule 9.01(b). The issues addressed in this memorandum are:

(1) Is mandamus an appropriate remedy?

(2) Do the actions of the District Court violate Kansas law?

(3) Do the actions of the District Court violate Constitutional guarantees?

(4) Does the holding of *Shutts I* remain viable in light of subsequent pronouncements?

The issues before this Court are currently also before the United States Supreme Court. The United States Supreme Court has granted certiorari to consider the case of *The Gillette Company v. Miner*, 87 Ill.2d 7, 428 N.E.

2d 478 (1981) *cert. granted* 50 U.S. Law Week 3796 (1982). A copy of the Petition for Certiorari is attached to this memorandum as Exhibit "A." It is clear that the United States Supreme Court decision in *Gillette* will control the disposition of the constitutional arguments raised in this mandamus proceeding. Phillips respectfully requests this Court stay action in the lower court until after the United States Supreme Court has acted on what is the controlling issue of law.

I. MANDAMUS IS AN APPROPRIATE MEANS TO DEFINE JURISDICTION

Kansas law justifies the use of extraordinary writs to restrain the actions of a public official when that official attempts to act beyond his legal authority. *Bushman Construction Co. v. Schumacher*, 187 Kan. 359, 356 P.2d 869 (1960). Indeed, extraordinary writs have been used to test the propriety of a court's assertion of jurisdiction over non-residents. *Vilm v. Hudson*, 167 Kan. 372, 205 P.2d 1021 (1949).

In *Muck v. Claflin*, 197 Kan. 594, 596, 419 P.2d 1017 (1966), this Court held: "Where a litigant has a right or privilege as a matter of law and there is no other remedy, this Court will entertain a mandamus action to protect it." In *Muck*, mandamus was entertained in a dispute involving discovery seeking insurance policy limits. In *Cloonan v. Goodrich*, 161 Kan. 280, 167 P.2d 303 (1946), and *State Highway Commission v. Hembrow*, 190 Kan. 742, 378 P.2d 62 (1963), mandamus was allowed to require that the trial of those actions be to a jury.

The necessity of granting the extraordinary relief sought in this action is as compelling to Phillips in this case as it was in *Muck*, *Cloonan*, or *Hembrow*. Phillips

now faces the specter of trying a case involving approximately 34,000 parties. A trial and appeal of this case could thus be prolonged, and will necessarily be complicated because of significant factual differences between this case and *Shutts I*. Phillips asserts that the court is without jurisdiction over the claims of over 97 percent of these individuals. The importance of obtaining review of the District Court's order at this time and the harm which would befall Phillips if review is denied are clear. Phillips thus asserts that this case is properly before the Court.

II. CERTIFICATION OF A NATIONWIDE CLASS WAS CONTRARY TO THE KANSAS SUPREME COURT'S HOLDINGS

The Kansas Supreme Court has recognized the necessity of affiliating circumstances (i.e., a necessary legitimate interest) between plaintiff class litigation and the forum. In *Shutts I*, the Kansas Supreme Court held that *Feldman v. Bates Mfg. Co.*, 143 N.J. Super. 84, 362 A.2d 1177 (1976) was an "excellent example of a factual situation" in which class action status should be denied. In *Feldman*, a single plaintiff sought to represent 294 unnamed plaintiffs in an action against a foreign corporation. The corporation had no assets in New Jersey and was not authorized to do business in that state. Thirty-one unnamed plaintiffs, well over 10 percent, were residents of the forum. The cause of action on behalf of the class arose out of a common course of conduct.

The holding of *Feldman* was inapplicable to the factual situation present in *Shutts I*, since in *Shutts I* the necessary affiliating circumstances were held to be present. The Court in *Shutts I*, found that the fact that Kansas comprised the largest physical portion of the area affected

by Federal Power Commission Order No. 586 was a sufficient affiliating circumstance such that jurisdiction over the non-resident plaintiffs was appropriate. See, 222 Kan. at 537, 539, 550. Kansas had "a legitimate interest in adjudicating the common issue herein *because Kansas comprise[d] the largest physical area included in the FPC designated Hugoton-Anadarko area . . . .*" 222 Kan. at 557 (emphasis added).

The present factual situation discloses a completely different picture. A detailed analysis of the correlation between the various class members and various forums can be found in Affidavit No. 4 (originally filed as an attachment to Defendants' Brief on Jurisdiction Over Claims of Non-Residents and attached hereto as Exhibit "B"). The Affidavit shows that of the three rate increases involved in *Shutts II*, Opinion No. 749 had the greatest impact on Kansas. Even in this case, however, the interest of Kansas is minute. Of the 20,566 royalty owners across this nation, only 553 are residents of Kansas, less than 2.7%. Of the 6,109 leases across this nation, only 15 are located in Kansas, less than one quarter of one percent (.25%). These figures clearly show the relative insignificance of the interest of Kansas when compared to that of other states:

State	No. of Royalty Owners	No. of Leases
Texas	7,881	3,479
Oklahoma	3,591	1,948
New Mexico	339	350
Louisiana	740	178
Wyoming	37	68
West Virginia	246	32
Arkansas	171	32
Kansas	553	15
Mississippi	88	3
Utah	18	1
Illinois	357	1

The interest of Kansas in this litigation does not even have the affiliating circumstances found to be so significant in *Shutts I*. In this nationwide order, Alaska would seem to comprise the largest physical area of the area affected. Of the states in which Phillips owns oil interests, the areas are:

State	Area (sq. mi.)
Texas	267,339
New Mexico	121,666
Wyoming	97,914
Utah	84,916
Kansas	82,264
Oklahoma	69,919
Illinois	56,400
Arkansas	53,104
Louisiana	48,528
Mississippi	47,716
West Virginia	24,181

Under these circumstances, it is clear that Kansas courts have no "legitimate interest" in resolving the claims now asserted by non-residents of Kansas. What is the impact on Kansas of a dispute arising from the sale of gas in Illinois between, say, a New York resident and Phillips, a Delaware corporation with its principal place of business in Oklahoma? As held by the Kansas Supreme Court in *Shutts I*, 222 Kan. at 557, careful attention must be given to possible difference of laws, so this Kansas Court would be placed in the position of ruling on a possibly unresolved issue of foreign law in a dispute involving non-residents, neither of which actively chose this forum as the place in which to litigate their dispute.

It would appear that the facts now before this Court present a substantially less compelling basis for certifying a class than was present in *Feldman v. Bates Mfg. Co.* In *Feldman* over 10 percent of the class members were residents of New Jersey, the forum state. In *Shutts II*, less than 2.5 percent of the possible class members are residents of Kansas. The possible recovery of Kansas residents or non-residents who have an interest in Kansas leases would only be six to nine percent interest on $122,-638.40, the amount paid to these people. This $122,638.40 represents less than 1.9 percent of the amount paid by Phillips pursuant to the three FPC opinions. The amount of money attributable to Kansas leases under all three of those opinions is less than .00254 percent of the total amount paid. While Kansas Courts may have a legitimate interest in ensuring that the people affiliated with Kansas have their claims heard, this proportionally negligible amount cannot serve as a legitimate basis on which to predicate a nationwide class.

The plaintiffs in *Shutts II* claim that the forum need not have a legitimate interest. The plaintiffs would require

only that there be jurisdiction over the defendant and procedural due process accorded absent class members. This argument, which ignores the requirement of a "legitimate interest" leads to absurd results. Pursuant to this concept, this action could be tried in Rhode Island, where $2.19 was paid to class members under Opinion 749, or in Illinois where one lease was located which produced $1.30 of extra royalty. For that matter, acceptance of plaintiffs' theory would result in it being possible to bind Kansas residents by judgments entered in any state in which Phillips has a registered agent whether or not any lease or royalty owner was located there. This result clearly does not comport with the requirement of the Kansas Supreme Court that the forum have a "legitimate interest" in the litigation, or "traditional notions of fair play and substantial justice," inherent in constitutional due process limitations.

III. THE LACK OF A LEGITIMATE INTEREST MAKES CERTIFICATION OF A NATIONWIDE CLASS UNCONSTITUTIONAL

The Court's action in certifying a nationwide class impinges on the constitutional rights of both Phillips and the unnamed plaintiff class members. Both Phillips and the unnamed plaintiff class members have the constitutional right to have their dispute tried by a forum which is legitimately interested in the underlying dispute. The nature of this right can easily be discerned in the Supreme Court cases governing assertion of jurisdiction over non-residents.

The traditional concepts of jurisdiction over non-residents require an assessment of the relationship between the litigation, the forum and the defendants. Since the decision of *International Shoe Co. v. Washington*, 326

U.S. 310, 90 L. Ed. 95, 66 S. Ct. 154 (1945), the strength of these relationships has been the determining factor in U.S. Supreme Court cases.

Of these various relationships, the nexus between the litigation and the forum has been given great weight in determining whether the exercise of jurisdiction is proper. In *McGee v. International Life Ins. Co.*, 355 U.S. 220, 2 L. Ed. 2d 223, 78 S. Ct. 199 (1957), the Court held that an insurance company could be held liable on an insurance contract in a California court, although the company had little contact with the forum. The deciding factor was the relationship between the forum and the litigation. Jurisdiction was proper where the forum had "a manifest interest in providing effective means of redress for its residents . . . ." The plaintiffs would suffer "a severe disadvantage if they were forced to follow the insurance company to a distant state in order to hold it legally accountable." *Id.* at 223, 2 L. Ed. 2d at 226. For these reasons, the relationship between the cause of action and the forum justified and the exercise of jurisdiction.

Those same reasons which justified exercise of jurisdiction in *McGee* required denial of jurisdiction in *Hanson v. Denckla*, 357 U.S. 235, 2 L. Ed. 2d 1283, 78 S. Ct. 1228 (1958). *Hanson* involved the exercise of jurisdiction over a Delaware trustee by a Florida court. That action involved "an agreement that was entered without any connection with the forum State." *Id.* at 252, 2 L. Ed. 2d at 1297. "The first relationship Florida had to the agreement was years [after the agreement was executed] when the settlor became domiciled there . . . ." *Id.* Thus, the suit could not be said to be "one to enforce an obligation that arose from a privilege the defendant exercised in Florida." *Id.* The lack of affiliating circumstances be-

tween the forum and the litigation made the exercise of jurisdiction improper.

In recent years the Supreme Court has reaffirmed and emphasized the importance of the presence of some nexus between the litigation and the forum. *Shaffer v. Heitner*, 433 U.S. 186, 53 L. Ed. 2d 683, 97 S. Ct. 2569 (1977) involved a *quasi in rem* action brought under a Delaware sequestration statute. The plaintiff was seeking to assert jurisdiction over the defendant by virtue of property of the defendant being found in Delaware. The cause of action arose outside of the forum state. In *Shaffer* the Supreme Court held that *"all assertions of state court jurisdiction* must be evaluated according to the standards set forth in *International Shoe* and its progeny." *Id.* at 212, 53 L. Ed. 2d at 703 (emphasis added). Jurisdiction was asserted solely on the basis of the presence of defendant's property in the forum state. Yet, the court noted, "that property [was] not the subject matter of this litigation, nor [was] the underlying cause of action related to the property." *Id.* at 213, 58 L. Ed. 2d at 703. The plaintiff did not "identify any act related to his cause of action as having taken place in Delaware." *Id.* The lack of affiliating cricumstances between the litigation and the forum made the assertion of jurisdiction improper.

The two most recent Supreme Court pronouncements on this topic are *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 62 L. Ed. 2d 490, 100 S. Ct. 559 (1980), and *Rush v. Savchuk*, 444 U.S. 320, 62 L. Ed. 2d 516, 100 S. Ct. 571 (1980). Both were decided subsequent to *Shutts I*.

World-Wide Volkswagen considered at length the concept of jurisdiction and its relationship to the 14th amendment. The concept of personal jurisdiction serves two

purposes. Not only does it protect a non-resident defendant from the burdens of litigating a case in a distant forum, but it also "acts to ensure that the States, through their courts, do not reach out beyond the limits on them by their status as coequal sovereigns in a federal system." 444 U.S. at 292, 62 L. Ed. 2d at 498. The relationship between the defendant and the forum must be such that it is "reasonable . . . to require the corporation to defend the particular suit which is brought there." *Id. quoting, International Shoe Co. v. Washington*, 326 U.S. at 317, 90 L. Ed. 95, 66 S. Ct. 154.

The burden or lack of burden on a defending party is only one factor to consider. The Court must consider other relevant factors, including

> the forum State's interest in adjudicating the dispute, see McGee v International Life Ins. Co. 355 US 220, 223, 2 L. Ed. 2d 223, 78 S Ct 199 (1957); the plaintiff's interest in obtaining convenient and effective relief, see Kulko v California Superior Court, supra, at 92, 56 L. Ed. 2d 132, 98 S Ct 1690, at least when that interest is not adequately protected by the plaintiff's power to choose the forum, cf. Shaffer v Heitner, 433 US 186, 211, n 37, 53 L. Ed. 2d 683, 97 S Ct 2569 (1977); the interstate juridical system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies, see Kulko v California Superior Court, *supra*, at 93, 98, 56 L. Ed. 2d 132, 98 S Ct 1690.

444 U.S. at 292, 62 L. Ed. 2d at 498.

The limits imposed on a state court arise from the sovereign nature of the states:

> [T]he States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States - a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.

444 U.S. at 293, 62 L. Ed. 2d at 499. The due process clause acts to defend the concept of federalism even in cases where the defendant would be unharmed by the plaintiff's choice of forum:

> Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.

444 U.S. at 294, 62 L. Ed. 2d at 499-500.

Rush v. Savchuk, 444 U.S. 320, 62 L. Ed. 2d 516, 100 S. Ct. 571 (1980), decided the same day as *World-Wide Volkswagen* is much more analogous to the situation at hand. The plaintiff in *Rush* sought to assert jurisdiction over a defendant's insurance company using the jurisdictional theory set forth in *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312 (1966). This theory involved attaching the liability policy of a defendant. If the insurer can be found in a *Seider* jurisdiction, the contractual obligation to defend and indemnify up to the policy limits is thought to be a debt, subject to attachment, sufficient to support *quasi in rem* jurisdiction over the absent defendant. 444

U.S. 325-26, 62 L. Ed. 2d at 523. In this manner, the Minnesota plaintiff was able to obtain jurisdiction over a non-resident defendant in a claim for damages sustained outside of the forum state.

In striking down the assertion of jurisdiction in this case, the court again reviewed the governing principles:

> In determining whether a particular exercise of state court jurisdiction is consistent with due process, the inquiry must focus on "the relationship among the defendant, the forum, and the litigation." Shaffer v. Heitner, supra. at 204, 53 L. Ed. 2d 683, 97 S Ct 2569.

444 U.S. at 327, 62 L. Ed. 2d at 524. The mere presence of property within the jurisdiction was insufficient.

> We held in *Shaffer* that the mere presence of property in a State does not establish a sufficient relationship between the owner of the property and the State to support the exercise of jurisdiction over an unrelated cause of action.

444 U.S. at 328, 62 L. Ed. 2d at 525. Indeed, the "adventitious" decision of the insurer to be present in the state did not have any jurisdictional significance.

The focus required by *Rush v. Savchuk* is on "the relationship among the defendant, the forum, and the litigation." 444 U.S. at 327, 328 n.14, 332, 62 L. Ed. 2d at 524, 525, 527.

The teachings of these most recent Supreme Court holdings, applicable to this present case are clear. A state court, as a result of the constitutional notion of federalism is territorially limited in the extent to which it can assert jurisdiction. A dispute involving a resident defendant, or which arose in the forum, or in which the forum is

otherwise interested is properly resolved by a forum court. The exercise of jurisdiction over a non-resident, however, requires some link between the non-resident and the forum. In the absence of an affiliating circumstance, the sovereign nature of the states prevents the assertion of jurisdiction over the non-resident. This notion of federalism would prevent the binding of Kansas residents by a judgment under the circumstances in *Shutts II* rendered in Illinois, or Rhode Island, in light of the lack of nexus between that forum and the litigation. Similarly, the same territorial limitation should prevent this Court from binding Oklahoma residents in their dispute which arose in Oklahoma, with a company whose principal place of business is Oklahoma. The sovereign nature of the states prevent one state from interfering in the intra-state affairs of another state. The notion of due process affords a citizen the right not to be bound by a judgment entered into in a disinterested foreign state. For these reasons, the exercise of jurisdiction over a nationwide class in this case violates the holdings of *World-Wide Volkswagen v. Woodson* and *Rush v. Savchuk*.

The requirement that the forum possess a legitimate interest created by a substantial nexus between the forum and the litigation apply equally to non-resident plaintiffs in a plaintiff class action. The necessity of such a connection can be seen in the "common fund" class action cases of *Supreme Council Royal Arcanum v. Green*, 237 U.S. 531, 35 S. Ct. 724, 59 L. Ed. 1089 (1915); *Hartford Life Insurance Co. v. Ibs*, 237 U.S. 662, 36 S. Ct. 692, 59 L. Ed. 1165 (1915), *Hartford Life Insurance Co. v. Barber*, 245 U.S. 146, 38 S. Ct. 54, 62 L. Ed. 208 (1917), and *Sovereign Corp of Woodmen of the World v. Bolin*, 305 U.S. 66, 59 S. Ct. 35, 83 L. Ed. 45 (1938). In all of these cases, there was the requisite nexus between the litigation and the forum to make a decision binding even against a non-

resident plaintiff. In all of these cases, the judgment asserted as a bar was decided in the state of incorporation of the defendant. The rights adjudicated arose and were determined by the laws of the state in which the defendant was chartered. Indeed the situs of the fund was the forum. The necessary connection among the defendant, the forum and the litigation was sufficiently strong to justify adjudicating the rights of the unnamed, non-resident plaintiffs.

No argument can be made that the "common fund" cases are directly applicable to the present case. Although the Court in *Shutts I* held that the common fund cases were "analogous," the numerous distinctions between this case and the "common fund" cases prevent those cases from being directly applicable. As noted in *Shutts I*, there was no separate fund as such. 222 Kan. at 552. The closest thing to a "fund" found in *Shutts I* was the obligation represented by the corporate undertaking filed by Phillips with the FPC to guarantee refund to pipeline companies of any portion of the rate increase disapproved by the FPC. The Court in *Shutts I* then purported to segregate a portion of this undertaking into an amount which would be claimed by royalty owners in the event of affirmation of the rate increase. The plethora of contractual relationships under which royalty owners may claim entitlement to royalties arising from a FPC gas price increase makes it impossible to sequester a portion of the corporate undertaking into an amount which would bear any relationship to the final obligation of Phillips to royalty owners flowing from the approval of a FPC price increase.

At best, the total liability of Phillips to royalty owners for royalties arising from an increase in gas prices is simply an aggregation of individual claims, determined by individual contractual arrangements and by different

states' laws. This total liability might be likened unto a fund, but the individual factors which determine individual entitlement to a recovery from Phillips prevents this "fund" from being "common."

The royalty owners claims to interest is even more difficult to shape into the context of a common fund. These claims are equitable in nature, and are creations of the various state law. These claims are subject to various defenses under various state law provisions. The amount of those claims is determined in accordance with the various state laws. There is no common interest in these claims, and indeed, without this element of a common interest in these claims, their aggregation so as to form a "common fund" would seem inappropriate. Were there a common interest aggregation would be appropriate and would make this case susceptible to federal court jurisdiction. *See, Glover v. Johns Manville,* 662 F.2d 225, 230 (4th Cir. 1981). In *Shutts I* this Court recognized the plaintiffs' inability to aggregate their individual claims in order to obtain federal court jurisdiction. *Shutts I,* 222 Kan. at 544-45.

The "common" requirement of any claims to any "fund" held by Phillips is defeated by conflicting laws of states involved in this dispute. On at least two important issues, the law of Texas and the law of Kansas conflict. Just as these conflicting legal standards can defeat the commonality requirement of the class action statute, see *Shutts I,* 222 Kan. at 557, they also act to defeat the existence of any purported "common fund."

Texas gives effect to provisions in division orders which modify royalty agreements. In *Exxon Corp. v. Middleton,* 613 S. W. 2d 240 (Tex. 1981), the Texas Supreme Court held that division orders were "binding for the time the parties acted under them." 613 S.W.2d at 250. This

holding was reaffirmed more recently in *Sun Oil Company v. Madeley*, 25 Tex. S. Ct. J. 101 (Tex. Sup. 12/16/81). These decisions are directly contrary to the Kansas decision of *Maddox v. Gulf Oil Corporation*, 222 Kan. 733, 567 P.2d 1326 (1977).

Other states which are involved in this case appear not to have ruled on this dispute. Commentators, however, take the position that the Texas approach is better. *See*, 4 Williams Oil & Gas Law, § 705: "Insofar as the division or transfer order differs from the lease as concerns the measurement of quantity, quality, price or value of the production, the lease provisions are modified by the provisions of the order as for all parties to the unrevoked order." Should a nationwide class be certified, the Court will be placed in deciding this unsettled legal issue pursuant to foreign law, and only some of the other states involved have certified question procedures.

The second conflicting area is the rate at which interest is allowed. Subsequent to *Shutts I*, the Texas Supreme Court considered a similar case in *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480 (1978). *Stahl* also dealt with whether interest was due on payments made following F.P.C. approval of an increased rate. In *Stahl*, Phillips had posted a corporate obligation and agreed to refund with interest any increase ultimately disapproved by the F.P.C. The Texas Supreme Court considered the contractual language which specified how royalty payments were determined, and held that the contract provided the basis for allowance of interest. *Id.* at 484. The Texas court also found that there existed an equitable basis for allowing interest. 569 S.W.2d at 487. The court, however, held that it was the statutory rate of interest that applied; noted several instances in which the statutory rate had been applied, and adopted that rate in *Stahl*. This hold-

ing is directly contrary to the holding of the Kansas Supreme Court. The incorrect forecast by the Kansas Supreme Court in *Shutts I* resulted in a judgment being rendered against this non-resident defendant, in favor of non-resident plaintiffs, in an amount greater than was owed. The due process clause acting as an instrument of interstate federalism and acting to ensure the "orderly administration of the laws," should prevent such a result. *See, International Shoe Co. v. Washington*, 326 U.S. at 319.

An alternative choice of law might itself have constitutional implications. For example, the application of Kansas law to transactions unrelated to this state might violate constitutional provisions:

> [F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.

Allstate Ins. Co. v. Hague, 449 U.S. 302, 101 S. Ct. 633, 66 L. Ed. 2d 521, 531 (1981).

Even assuming the existence of a common fund, the mere presence of Phillips in this jurisdiction, without more, does not provide a sufficient basis for exercising jurisdiction over the "common fund" purportedly held by Phillips. The fiction that "a debt follows the debtor" is not a constitutionally sound basis for exercising jurisdiction. *Rush v. Savchuk*, 444 U.S. at 330, 62 L. Ed. 2d at 526. Indeed, this basis for binding Phillips and unnamed class members is foreclosed by the holding of both *Shaffer v. Heitner* and *Rush v. Savchuk*. The presence of property in a forum unrelated to the litigation was an insufficient basis for asserting jurisdiction.

The holding of *Rush v. Savchuk* reaffirms the holding of *Shaffer v. Heitner*, and strongly supports the position taken by Phillips. In *Rush*, the Supreme Court held that the mere presence of an asset in the forum jurisdiction did not provide an adequate basis for adjudicating the rights of the non-resident owner of that asset. If, in fact, there is some "common fund" held by Phillips, the mere presence of Phillips in a state does not make that state the situs of the common fund. If this fiction were viable, the "common fund" would have a situs in all 50 states in which Phillips has a registered agent and is authorized to do business. Were this fiction constitutionally sufficient, each of the 50 states would have a sufficient interest in resolving this dispute.

The requisite nexus between the forum and the claims of the non-residents is absent. These plaintiffs are not residents of Kansas, so Kansas courts have no "manifest interest in providing effective means of redress for its residents . . . ." Compare *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223, 2 L. Ed. 2d 223, 78 S. Ct. 199, *Hanson v. Denckla*, 357 U.S. 235, 251-53, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958), and *International Shoe, supra*, 326 U.S. at 319, 66 S. Ct. 154. The cause of action did not arise in the forum so the forum state has no interest in regulating the activity of the defendant vis-a-vis the non-resident plaintiffs. *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 70 S. Ct. 927, 94 L. Ed. 1154 (1949). *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 305, 62 L. Ed. 2d 490, 506, 100 S. Ct. 559 (1980) (Brennan, J. dissenting) ("The state has a legitimate interest in enforcing its laws designed to keep its highway system safe . . . .") Since the cause of action did not arise in Kansas, necessary witnesses may have to be brought into the forum. *Cf. McGee v. International Life*

Ins. Co., 355 U.S. 220, 223, 2 L. Ed. 2d 223, 226, 78 S. Ct. 199. The denial of this forum impairs neither the non-residents interest in obtaining convenient and effective relief, see *Kulko v. California Superior Court*, 436 U.S. 84, 92, 56 L. Ed. 2d 132, 98 S. Ct. 1690 (1978), nor the non-residents power to choose their own forum. *Cf. Shaffer v. Heitner*, 433 U.S. 186, 211 n. 37, 53 L. Ed. 2d 683, 702, 97 S. Ct. 2569 (1977). The present forum was determined by the totally adventitious presence of three named plaintiffs with somewhat similar claims to those of unnamed non-resident plaintiffs.

Dismissal of the claims of non-residents will not deprive them of a forum in which to litigate their claims. The importance of such an alternative forum was recognized by the Kansas Supreme Court. *See Shutts I*, 222 Kan. at 550. In fact, two of the present named plaintiffs in *Shutts II* are residents of Oklahoma and initially brought an identical suit in Oklahoma, but voluntarily dismissed the suit. In virtually every way, Oklahoma is a better forum for this case. The principal place of business of Phillips Petroleum Co. is Bartlesville, Oklahoma. Access to proof will be easier in Oklahoma than in Kansas. Oklahoma has a substantially larger number of leases, royalty owners and potential claims than Kansas. Oklahoma has a legitimate interest in regulating the conduct of Phillips vis-a-vis non-resident persons. The decision of these non-resident plaintiffs to reassert this case in this state smacks of impermissible forum-shopping.

Moreover, the Oklahoma Procedural Rules governing class actions address the due process problems in a much better way than do the Kansas Statutes. The Oklahoma Statutes provide for an "opt-in" method in place of the Kansas "opt out" provision. Under the Oklahoma procedures, a class member who wishes to voluntarily enter

an action must unmistakably manifest his or her desire to do so by a specific affirmative act. This affirmative assent to jurisdiction satisfies due process even under the most rigorous standards. The voluntary consent to be bound makes unnecessary the application of the minimum contacts test. The consent itself is a sufficient "affiliating circumstance" between the non-resident and the forum to justify the forum in hearing and deciding the case.

IV. SUBSEQUENT UNITED STATES SUPREME COURT PRONOUNCEMENTS HAVE OVERRULED *SHUTTS I*

Pronouncements of the United States Supreme Court subsequent to *Shutts I* have indicated that the jurisdiction issue in *Shutts I* was incorrectly decided, or is no longer a correct statement of the law. In 1980, the Supreme Court again stated that "*all assertions of state court jurisdiction* must be evaluated according to the standards set forth in *International Shoe* and its progeny." *Rush v. Savchuk*, 444 U.S. 320, 327, 62 L. Ed. 2d 516, 100 S. Ct. 571 (1980), *quoting*, *Shaffer v. Heitner*, 433 U.S. at 212. Phillips submits that this statement is as applicable to non-resident plaintiffs not voluntarily before the court as it is to non-resident defendants. The minimum contact must be met with each individual whose rights are sought to be adjudicated. *See Rush v. Savchuk*, 444 U.S. at 332, 62 L. Ed. 2d at 527.

The opt-out procedure, which requires a non-resident plaintiff to take affirmative steps to avoid the assertion of jurisdiction cannot constitutionally create a sufficient basis for assuming jurisdiction over the individual. A state court which *ab initio* lacks jurisdiction over a non-resident does not have the power to compel such non-resident to take affirmative steps to avoid the assertion

of jurisdiction. The "unilateral activity of those who claim some relationship with a non-resident" cannot satisfy the requirements of due process. *Hanson v. Denckla*, 357 U.S. at 253, 2 L. Ed. 1283, 78 S. Ct. 1228; *World-Wide Volkswagen v. Woodson*, 444 U.S. at 298, 62 L. Ed. 2d at 502. The named plaintiffs' activities in Shutts II, in bringing the suit and in causing issuance of notice and requests for exclusion are each "unilateral activities." The opt-out procedure should again be compared to the opt-in procedures used in Oklahoma. The affirmative act required by an opt-in statute is not subject to these criticisms. An affirmative manifestation of an assent to be bound is an unambiguous consent to jurisdiction. It is not the result of unilateral activities of someone claiming a relationship with the non-resident.

The Kansas Supreme Court held in *Shutts I* that the interest which Kansas residents have in common with non-residents in recovering damages for Phillips' withholding of royalties, constitutes a "contact" between the non-residents and Kansas. 222 Kan. at 558. The strength of this "contact" is questionable at best. Indeed, it is doubtful that this type of contact could constitutionally satisfy the due process requirements. Again, this type of activity is "unilateral activity of those who claim some relationship with a non-resident." Even disregarding this shortcoming, and assuming the existence of a "contact" between the non-residents and Kansas, the nature of this contact will not satisfy due process standards. The "contact" found was the "common" interest in a purported "common fund." Yet, there was no showing of the situs of that fund. Both *Shaffer v. Heitner* and *Rush v. Savchuk* foreclose premising jurisdiction on the basis that the holder of the fund can be found within the jurisdiction. The clear constitutional requirements cannot be met in this case.

As a matter of comity and federalism, this state should not certify a nation-wide class and enter judgment as to the claims of non-residents since that judgment will not be honored in all other states. It is clear that Pennsylvania and New Jersey believe that a state court cannot exercise jurisdiction over claims of non-resident class members who have no "contacts, ties or relations" with the state. *See Klemow v. Time, Inc.*, 466 Pa. 189, 352 A.2d 12, *cert. denied*, 429 U.S. 828 (1976); *Feldman v. Bates Mfg. Co.*, 143 N.J. Super. 84, 362 A.2d 1177 (App. Div. 1976). A judgment entered in Kansas would appear to be unenforceable in either of those states. Moreover, there is no clear holding in Oklahoma, or Texas, or any of the other states in which leases are located as to whether those courts would recognize a judgment in this case. *See Hall v. Helicopteros Nationales de Columbia, S.A.*, 25 Tex. S. Ct. J. 190 (2/24/82) (a copy attached). It is thus possible that the efforts of the Kansas courts in resolving this dispute would be little more than an academic exercise, and the results obtained would be ignored by the states most affected.

The Kansas Supreme Court's holding in *Shutts I* does not give the requisite deference to the role of federalism, and more specifically, the importance territory plays in considerations of jurisdiction. The importance of this factor can be seen by the discussion accorded it in *World-Wide Volkswagen v. Woodson* and *Rush v. Savchuk*. These decisions handed down after the Kansas Supreme Court's decision in *Shutts I* demonstrate that the holding of the Kansas Supreme Court has been overruled. This Court should require the District Court Judge to eliminate from the class the unnamed non-resident class members.

CONCLUSION

The plaintiffs in Shutts II, two of them non-residents, chose to bring this lawsuit in a forum which is largely disinterested in the resolution of this dispute. Indeed, these two non-resident plaintiffs chose to dismiss a case brought in the most appropriate forum in which to litigate this claim. If the Court finds, as Phillips has demonstrated in this brief, that a nation-wide class is inappropriate, the plaintiffs will still be free to return to the best forum in which to litigate this dispute. The existence of an alternative forum, more convenient to the named plaintiffs, and much more interested in resolving this dispute, should dispel any spector that failing to certify a nation-wide class would work a hardship on anyone.

The assertion of the class action in this forum results in this claim violating the rights of Phillips and the rights of non-resident plaintiff class members. The constitutional requirement that the state have some interest in this action is not fulfilled. This deficiency results in a denial of due process to both Phillips and the unnamed plaintiff class members. Justice for non-resident plaintiffs can best be found in these non-residents' home states. Limitation of this class will serve the interests of justice. The Court should issue the requested writ.

Respectfully submitted,

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Joseph W. Kennedy

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EXHIBIT "B"

IN THE
DISTRICT COURT OF SEWARD COUNTY, KANSAS

Case No. 79-C-113

IRL SHUTTS and ROBERT ANDERSON and BETTY ANDERSON, individually and as representatives of all producers and royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds or royalties pursuant to Federal Power Commission Opinions Nos. 699, 699H, 749, 749C, 770 and 770A,
Plaintiffs,

vs.

PHILLIPS PETROLEUM COMPANY,
Defendant.

AFFIDAVIT NO. 4

STATE OF OKLAHOMA)
) SS.
COUNTY OF WASHINGTON)

C. A. Roberts, of Bartlesville, Oklahoma, being first duly sworn, deposes and states under oath the following facts:

1. That the following is based on Affiant's own personal knowledge, and is submitted for use and for any lawful purpose on behalf of defendant Phillips Petroleum Company in the above styled and numbered case (hereinafter called *"Shutts II"*).

2. That Affiant is: an employee of Phillips Petroleum Company where he serves as gas royalty administrator;

and that he has had that position since 1974; and that the duties of such position included responsibility for coordinating the payment of additional monies to Phillips' royalty owners (i.e., Phillips' lessors, outside lessors to whom Phillips accounts, and all overriding royalty interest owners) following the finality of Federal Power Commission Opinion Nos. 699, 699H, 749, 749C, 770 and 770A.

3. That Affiant has requested and received an unaudited summary of the additional monies paid which shows for each Opinion: (1) the number and the domicile of the leases to which the money is attributed and the amounts attributed by state; and (2) the number and the domicile of the payees of the money and the amounts paid by state. These summaries were derived from the accounting business records of Phillips Petroleum Company. The summary of said information appears as Attachments A and B.

4. Further affiant saith not.

/s/ C. A. Roberts
C. A. Roberts

Sworn to and subscribed before me this 1st day of April, 1982.

/s/ Patsy Graham
Notary Public

My commission expires: June 22, 1984.

Attachment A

PHILLIPS PETROLEUM COMPANY

Represents a schedule of values applicable to leases domiciled by
State Federal Power Commission Opinion Nos. 699, 749 and 770

Lses. Domicile	Opinion 699		Opinion 749		Opinion 770	
States	# Owners	Value	# Owners	Value	# Owners	Value
Oklahoma	1,266	$ 83,711.35	1,948	$ 243,163.49	1,430	$ 471,122.53
Texas	4,414	839,152.73	3,479	2,171,217,36	3,702	2,615,744.46
Kansas	3	152.88	15	2,619.24	4	115.10
Arkansas	6	3,228.22	32	1,769.33	2	552.83
Louisiana	68	2,187,548.06	178	352,539.45	26	516,248.13
New Mexico	941	433,574.85	350	22,670.27	591	194,799.95
Illinois	—	—	1	1.30	1	.01
Wyoming	690	148,906.93	68	67,570.01	476	945,441.09
Mississippi	—	—	3	694.93	—	—
Utah	—	—	1	184.60	—	—
W. Virginia	—	—	32	10,364.61	—	—
No State Code	1	[.05]	2	1,032.59	—	—
	7,389	$3,696,274.97	6,109	$2,873,827.18	6,232	$4,744,024.10

Attachment B

PHILLIPS PETROLEUM COMPANY

Represents a schedule of values paid and/or accrued to owners pursuant to Federal Power Commission Opinion Nos. 699, 749 and 770 Domiciled by Location

State	Opinion 699		Opinion 749		Opinion 770	
	# Owners	Value	# Owners	Value	# Owners	Value
Alaska	33	$ 1,261.15	14	$ 97.55	20	$ 399.76
Alabama	45	4,553.13	44	886.70	39	3,178.19
Arizona	226	14,930.86	206	12,579.62	207	23,427.35
Arkansas	173	2,399.71	171	7,764.09	162	8,967.61
California	1,604	46,702.19	1,374	55,341.35	1,331	178,190.28
Colorado	505	189,660.33	367	88,652.58	485	164,784.52
Connecticut	54	507.02	86	1,143.92	56	2,449.32
Dist./Columb.	47	1,064.66	45	536.56	39	6,862.53
Delaware	31	10,457.02	18	212.48	19	237.04
Georgia	45	1,377.18	50	2,310.43	43	2,068.09
Florida	272	9,260.13	307	28,603.17	239	8,649.57
Hawaii	5	10.92	14	235.71	11	191.54
Iowa	182	2,344.80	180	12,682.50	176	6,237.64
Idaho	24	424.90	23	402.11	26	1,900.86
Illinois	397	25,090.75	357	36,473.09	353	44,312.58
Indiana	87	786.52	80	10,028.69	74	2,385.15
Kansas	496	9,281.75	553	37,818.00	504	75,538.65
Kentucky	47	584.46	50	111.73	43	956.65
Louisiana	1,244	1,688,366.22	740	246,607.09	361	434,741.61
Massachusetts	56	821.82	42	3,450.80	35	3,738.12
Maryland	52	3,660.63	49	1,413.34	49	4,204.97
Maine	11	92.51	11	3.18	4	458.05
Michigan	75	6,245.84	65	5,916.08	68	4,355.96
Minnesota	104	3,072.74	69	2,297.24	87	5,098.68
Missouri	276	13,840.43	269	54,601.95	240	72,234.27
Mississippi	67	6,069.39	88	1,327.41	36	16,649.38
Montana	53	1,521.94	22	316.85	32	1,483.82
N. Carolina	61	2,248.09	39	1,110.52	39	1,158.65
N. Dakota	8	17.60	5	69.39	8	475.47

Attachment B (Continued)

PHILLIPS PETROLEUM COMPANY

Represents a schedule of values paid and/or accrued to owners pursuant to Federal Power Commission Opinion Nos. 699, 749 and 770 Domiciled by Location

State	Opinion 699		Opinion 749		Opinion 770	
	# Owners	Value	# Owners	Value	# Owners	Value
Nebraska	86	$ 1,399.95	43	$ 2,326.33	72	$ 7,306.08
New Hampshire	11	307.83	11	502.38	10	542.58
New Jersey	72	977.67	117	994.62	66	7,840.84
New Mexico	621	315,856.87	339	26,535.79	469	157,151.47
Nevada	56	1,516.14	49	2,143.52	51	3,753.41
New York	498	50,952.57	469	16,541.33	388	44,093.58
Ohio	84	837.33	105	4,166.51	74	6,844.23
Oklahoma	2,653	191,587.09	3,591	575,513.32	2,684	573,614.01
Oregon	135	2,562.96	111	2,253.51	123	14,484.55
Pennsylvania	192	2,233.57	159	4,412.98	160	1,353.29
Puerto Rico	—	—	—	—	—	—
Rhode Island	10	35.82	15	2.19	8	602.15
S. Carolina	29	410.57	27	660.43	24	309.35
S. Dakota	24	514.35	19	68.04	18	3,131.68
Tennessee	74	16,353.07	53	2,009.66	45	1,803.87
Texas	9,591	940,100.88	7,881	1,521,407.32	8,550	2,216,033.23
Utah	29	1,518.84	18	354.93	18	4,626.62
Vermont	8	96.63	11	248.38	7	939.07
Virginia	78	989.98	84	2,290.36	71	1,893.22
Virgin Islands	—	.28	1	22.50	1	.30
Washington	143	3,327.72	131	2,992.82	135	27,971.93
Wisconsin	87	929.22	89	5,740.29	88	13,926.50
W. Virginia	20	5,374.18	246	7,118,14	22	294.64
Wyoming	413	79,232.83	37	52,091.05	272	552,104.63
Foreign	109	2,436.82	69	761.81	110	828.33
	21,303	3,666,207.86	19,013	2,844,152.34	18,252	4,716,785.87
Unmatched Owners	1,025	30,067.11	1,553	29,674.84	1,046	27,238.23
	22,328	$3,696,274.97	20,566	$2,873,827.18	19,298	$4,744,024.10

(Filed August 7, 1979)

IN THE
DISTRICT COURT OF SEWARD COUNTY, KANSAS

Case No. 79-C-113

IRL SHUTTS and ROBERT ANDERSON and BETTY ANDERSON, individually and as representatives of all producers and royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds or royalties pursuant to Federal Power Commission Opinions Nos. 699, 699H, 749, 749C, 770 and 770A,
Plaintiffs,

vs.

PHILLIPS PETROLEUM COMPANY,
Defendant.

ANSWER, PRETRIAL MOTION AND COUNTERCLAIM

I.

ANSWER

COMES NOW the defendant Phillips Petroleum Company (Phillips) and for its answer to the plaintiffs' Petition alleges and states:

1. Phillips admits the allegations of paragraph 1 of the Petition.

2. Phillips denies the allegations of paragraphs 2 through 10 of the Petition except it is admitted that certain funds were disbursed by Phillips in accordance with Federal Power Commission Opinions Nos. 699, 699H, 749, 749C, 770 and 770A.

3. The Court is without jurisdiction of this purported nationwide class action. There is not a sufficient nexus between the State of Kansas and the claims alleged in the plaintiffs' Petition to confer jurisdiction upon the courts of the State of Kansas. Any such attempted exercise of jurisdiction by the courts of the State of Kansas would violate the laws of the State of Kansas, the Constitution of the State of Kansas, the Constitution of the United States of America and the Constitutions and Laws of the various states of the Union whose citizens and residents may have or claim some interest in the proceeding.

4. This action is not an appropriate class action, even if the Court had jurisdiction over said action, for the following reasons:

A. The claims of the named plaintiffs are not typical of the claims of the alleged class in that different legal relationships exist between the defendant and each of the purported class members. Phillips alleges that it has separate and distinct contractual relationships with each purported member of the alleged nationwide class and that each such member's rights and obligations are, and must be, initially determined in the context of its contractual relationship with the defendant. Since the contractual relationships vary widely in form and content, the claim of any particular purported class member is not typical with the claims of all other purported class members.

B. There is no common question of law that is common to all the members of the class. Each class member's right to relief is dependent not only upon his own particular fact situation but also upon the law of the jurisdiction wherein the said class member's alleged cause of action arose. The law in the

various states, with respect to the obligations of Phillips and the purported class members, varies considerably from state to state and therefore no common question of law exists.

C. There is no common question of fact which is common to all of the class members. As hereinbefore alleged each class member's claim is dependent upon his particular contractual relationship with Phillips and his right to relief is dependent upon that particular fact situation together with the particular law of the state in which such claim arose.

D. The named plaintiffs are not adequate representatives of the class which they purport to represent. As hereinbefore alleged, significant factual and legal differences with respect to each plaintiff are present and it may be in the interest of some class members to proceed on theories of recovery which would be inimical to the interests of the named class plaintiffs. Furthermore, the named class plaintiffs purport to represent a class not only of royalty owners but also of producers of natural gas although they themselves are not producers of natural gas and occupy a significantly different legal relationship to Phillips than do the producers. In many instances the producers themselves have relieved Phillips of any possible claim by the royalty owners and therefore claims and counterclaims may exist between the royalty owners on the one hand and the producers on the other hand. Because of such inherent conflicts between the positions of the two groups it is not ethically or legally possible for the named plaintiffs to represent a group composed of both competing interests.

5. Some or all of the claims of the plaintiffs and the purported class members are barred because of the con-

tractual relationship existing between Phillips and the particular plaintiff or purported class member. For example, certain purported class members have specifically contracted with Phillips to allow Phillips to retain, without interest, any additional money associated with Federal Power Commission (FPC) action regarding proposed gas price rate increases. Other purported class members, and again by contracts with Phillips, have specifically released Phillips from any liability for interest on the additional money paid by Phillips after final FPC action on the several pending gas price rate increase requests.

6. The additional monies paid out by Phillips pursuant to the three FPC Opinions (Nos. 669, 770 and 749) related to the full time period covered by said Opinions. However, Phillips did not receive the monies collected subject to refund pursuant to said Opinions until after the effective dates of the Opinions. Phillips denies that it either had posession of, or used, any of the so-called "suspense monies", on which the plaintiffs and purported class members claim interest is due, at any time prior to the actual receipts of the various monies collected subject to refund by Phillips.

7. Philips offered to pay to the plaintiffs and to the members of the purported class an amount equal to the sums collected by Phillips subject to refund, as the same were received, on the condition that the recipient of the monies would agree to refund to Phillips such amounts as were ultimately determined by the Federal Power Commission (FPC) to have been paid in excess of the just and reasonable rate. Substantial numbers of producers and royalty owners accepted this offer and thereafter currently received the additional money. Phillips' offers to make such payments have been judicially held to bar a subsequent claim for interest on the funds held

by Phillips from and after the date of the offer and without regard to whether or not the offer was subsequently accepted. This rule should be applicable, under the facts in this case, to all plaintiffs and purported class members. Accordingly, the interest claims of the plaintiffs and the purported class members are barred as a matter of law and/or on equitable grounds.

8. Following Phillips' offers to pay the money collected subject to possible refund to the plaintiffs and purported class members, some specifically directed Phillips not to pay them said money until such time as all FPC action was final. The interest claims of all those who did are barred.

9. Some or all of the claims asserted by plaintiffs and the purported class members are either barred or are not recognizable under the laws of the various jurisdictions wherein the alleged causes of action arose. It is alleged that the merits of the interest claim of each purported class member must be determined in accordance with the law of the state in which the alleged cause of action arose.

10. Some or all of the claims asserted by the plaintiffs and purported class members are barred by the appropriate statutes of limitation and/or by the doctrine of laches, and/or by the doctrine of res judicata.

11. Some or all of the claims asserted by the plaintiffs and purported class members are barred by the defenses of Accord and Satisfaction, and/or Compromise and Settlement, and/or Estoppel, and/or Payment, and/or Release, and/or Waiver.

12. Phillips denies that it is liable for interest in any amount to any person or entity but alleges, in the alternative, that if such interest is awarded by the Court

then the rate of such interest should be determined by the laws of the various states wherein the particular cause of action for said person or entity arose, and such interest should be computed on only those amounts of money actually received by Phillips, and only from and after the actual dates of the receipt of said money by Phillips.

WHEREFORE, having fully answered, the defendant Phillips Petroleum Company prays that this action be dismissed and that defendant have judgment herein for its costs.

II.

PRETRIAL MOTION

Pursuant to K.S.A. 60-212(d), Phillips moves the Court to hear and determine before the trial of the principal case, and prior to action by the plaintiffs for class certification, the defense contained in paragraph 3 of the foregoing Answer for the reason that if said defense is decided in the favor of Phillips, this action should be dismissed in whole or in part.

III.

COUNTERCLAIM

COMES NOW Phillips Petroleum Company (Phillips) and for its counterclaim against the plaintiffs and the purported class members herein alleges and states:

1. At all times relevant to this action, Phillips was a producer of natural gas subject to the provisions of the Natural Gas Act and the Federal Power Commission (now the Federal Energy Regulatory Commission). Phillips not only produced gas from leases in which it was the lessee but also purchased natural gas in the ordinary

course of its business and made royalty distribution pursuant to a wide variety of contractual arrangements.

2. To the extent that Phillips has overpaid any monies to plaintiffs or any members of the purported plaintiff class in this action then Phillips claims a right to set off such amounts of overpayment against any sums found to be due from Phillips to said class.

3. To the extent Phillips performed royalty accounting functions and made the royalty disbursements on behalf of other natural gas producers, at their direction, or lack thereof, Phillips is entitled to be indemnified by such producers for any loss or liability which Phillips sustains herein.

4. As a setoff, Phillips is entitled to recover from the plaintiffs and all members of the purported plaintiff class herein for their proportionate share of administrative costs and expenses incurred by Phillips on behalf of said persons or entities in obtaining higher prices for gas over the years. This would include the right to recover those administrative costs, expenses and attorneys fees not only in proceedings culminated in FPC Opinions Nos. 699, 699H, 749, 749C, 770 and 770A but also all other Federal Power Commission or Federal Energy Regulatory Commission proceedings from June 1, 1954 to the present time.

5. In the event, and only in the event, that the Court determines that Phillips is liable for interest, Phillips is entitled to recover, from all producers within the purported plaintiff class, interest on any and all additional money paid by them to Phillips pursuant to FPC Opinions Nos. 586, 699, 699H, 749, 749C, 770 and 770A.

6. Phillips specifically reserves the right, in the event, and only in the event, that this case is certified

as a class action, and after the membership of the class is made up, to plead further and more specific counterclaims against any and all class members who elect to be bound by the decision in this case. Until such time as the class is established Phillips cannot be more definitive about what such counterclaim will be, or against what persons or entities they will be plead.

WHEREFORE, having fully answered, Phillips prays for judgment in accordance with the foregoing allegations, for all costs, for attorney fees and expenses, for prejudgment interest, and for all other proper relief at law or in equity.

/s/ Joseph W. Kennedy
Joseph W. Kennedy
Morris, Laing, Evans, Brock
& Kennedy, Chartered
Suite 430, 200 West Douglas
Wichita, KS 67202
/s/ James R. Yoxall
James R. Yoxall
/s/ Richard R. Yoxall
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/s/ T. L. Cubbage, II
T. L. Cubbage, II
Phillips Petroleum Company
Legal Division
556 Frank Phillips Building
Bartlesville, OK 74004
Attorneys for Defendant
Phillips Petroleum Company

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Answer, Pretrial Motion and Counterclaim was mailed in the United States mail, postage prepaid, to the attorneys of record for the plaintiffs as shown below this 7th day of August, 1979:

W. Luke Chapin
Chapin, Penny & Goering
Chapin Building
Medicine Lodge, KS 67104

Ed Moore
Ginder, Moore & McLaughlin
202 S. Grand
Cherokee, OK 73728

/s/ Richard R. Yoxall

KAN. STAT. ANN. § 60-223

Class actions. (a) *Prerequisites to a class action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class actions maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) The prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) The inter-

est of members of the class in prosecuting or defending separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against members of the class; (C) the appropriate place for maintaining, and the procedural measures which may be needed in conducting, a class action.

(c) *Determination by order whether class action to be maintained; judgment; actions conducted partially as class actions.*

(1) As soon as practicable after the commencement and before the decision on the merits of an action brought as a class action, the court shall determine by order whether it is to be maintained as such. Where necessary for the protection of a party or of absent persons, the court, upon motion or on its own initiative at any time before the decision on the merits of an action brought as a non-class action may order that it be maintained as a class action. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) The judgment in an action maintained as a class action shall extend by its terms to the members of the class, as defined, whether or not the judgment is favorable to them.

In any class action maintained under subdivision (b) (3), the court shall exclude those members who, by a date to be specified, request exclusion, unless the court finds that their inclusion is essential to the fair and efficient adjudication of the controversy and states its reasons therefor. To afford members of the class an opportunity to request exclusion, the court shall direct that reasonable notice be given to the class, including specific notice to each member known to be engaged in a separate suit on the same subject matter with the party opposed to the class.

(3) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues such as the issue of liability, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this section shall then be construed and applied accordingly.

(d) *Orders in conduct of actions.* In the conduct of actions to which this section applies, the court may, without limitation, make appropriate orders: (1) Settling the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, or to include such allegations, and that the action in either case proceed accordingly. The orders may be combined with an order under K.S.A. 60-216, and may be altered or amended as may be desirable from time to time.

(e) *Dismissal or compromise.* An action brought as a class action, whether or not ordered to be maintained as provided in paragraph (1) of subsection (c), shall not be dismissed or compromised without the approval of the court, and the court in its discretion may order that notice of a proposed dismissal or compromise be given to the class in such manner as the court may direct.

UNIFORM CLASS ACTION ACT

Section 6. [Jurisdiction over Multi-State Classes]

[(a)] A court of this State may exercise jurisdiction over any person who is a member of the class suing or being sued if:

[(1)] a basis for jurisdiction exists or would exist in a suit against the person under the law of this State[;] [or]

[(2) the state of residence of the class member, by class action law similar to subsection (b), has made its residents subject to the jurisdiction of the courts of this State.]

[(b) A resident of this State who is a member of a class suing or being sued in another state is subject to the jurisdiction of that state if by similar class action law it extends reciprocal jurisdiction to this State.]

Comment

The reach of the court under this Act is restricted by both constitutional and statutory rule limitations. Persons beyond the court's reach may be able to participate in a plaintiff class action by intervention under provisions similar to Federal Rule 24 which exists in most states.

The court in deciding whether to certify the action as a class action is to consider the conflict of laws problems which may be involved. (See Section 3(12).) Those problems may exist because of the possibility of bringing the action in a jurisdiction other than that in which the operative facts occurred and because of the reach of the court under this section beyond the state in which the court is sitting.

The bracketed subsections of Section 6 incorporate reciprocal provisions which would allow a state to exercise jurisdiction in a sister state if that state has a reciprocal grant of power. There is some precedent for this sort of provision. (See, for example, the Uniform Certification of Questions of Law [Act] [Rule], the Uniform Foreign Depositions Act, and the Uniform Mandatory Disposition of Detainers Act.)

STATEMENT PURSUANT TO SUPREME COURT RULE 28.1

In compliance with this Court's Rule 28.1., a list of corporations in which Phillips Petoleum Company holds less than a 100% interest follows: Acurex Corporation; Aero Oil Company; Alyeska Pipeline Service Company; Arctic LNG Transportation Company; Bonny LNG Limited; Bruin Carbon Dioxide Sales Corporation; Calatrava Empress Para la Industria, Petroquimica, S.A.; Canada Western Cordage Co., Ltd.; Canyon Reef Carriers Inc.; Chisholm Pipeline Company; Cochin Refineries Ltd.; Colonial Pipeline Company; Comagnie Francaise du Carbon Black S.A.; Dixie Pipeline Company; Drisco S.A. de C.V.; Everglades Pipeline Company; Explorer Pipeline Company; Insurance and Reinsurance Brokers, Ltd.; Iranian Marine International Oil Company; Kaw Pipe Line Company; Kenai LNG Corporation; LeeFac, Inc.; Negromex S.A.; Newmont Mining Corporation; Nordisk Philblack AB; Norland GmbH; Norpipe A/S; Norpipe Petroleum U.K. Ltd.; Norsea Gas A/S; Norsea Gas GmbH; Norsea Pipeline Ltd.; Papago Chemicals, Inc.; Petrochim; Phillips Carbon Black Limited; Phillips Carbon Black Company (Pty.) Ltd.; Phillips Carbon Black Italiana S.P.A.; Phillips Gas Supply Corporation; Phillips Imperial Petroleum Limited; Phillips Pacific Chemical Company; Phillips Petroleum Singapore Chemicals (Private) Limited; Philmac Oils Limited; Plasticos Vanguardis S.A.; Polar LNG Shipping Corporation; Polyolefins; Quimica Veneco C.A.(b); Renolit Fertighaus GmbH; Salk Institute Biotechnology Industrial Assoc. Inc.; Seadock, Inc.; Seaway Pipeline Inc.; Sevalco (Holdings) Limited; SPODCO Ltd.; Venezoil, C.A.; Texas Offshore Port, Inc.; Transatlantic Reinsurance; Western Desert Operating Petroleum Company; White River Shale Oil Corporation.